Ang Soong Seng & Anor v Noraini bte Doralik & Anor

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 12–156 OF 1999
SURIYADI J
21 MARCH 2003

***Tort** — Negligence — Road accident — Appellants found 100% liable — Respondents innocent passengers — Driver of respondents not joined as a party — Whether respondents had legal right to proceed against any or all of the persons responsible for the accident*

The respondents were passengers in a car, driven by the husband of the first respondent (driver of the respondents). They were then en route to work. When confronted by thick smoke, which blocked his view, the driver of the respondents had maneuvred slightly to the right but returned to his original path as he saw an oncoming vehicle. Devoid of choice, except to drive through the said wall of smoke, he drove straight into it, to be confronted by the presence of a steamroller. Due to the proximity of the latter vehicle, the driver of the respondents was unable to avoid it, resulting in him crashing into the rear of that said steamroller. As a consequence of the collision the respondents suffered severe injury. The respondents subsequently filed a suit against the driver and owner of that steamroller, the current appellants, but none against the driver of the respondents. The sessions court held the appellants 100% liable, and whereupon the general and specific claim had been granted. The appellants appealed to the High Court.

Held, dismissing the appeal:

The respondents were innocent passengers. Being so positioned as mere spectators, they would have been unable to contribute in any way, positively or negatively towards the avoidance of a collision. The respondents therefore were within their legal rights to proceed against any or all of the persons responsible for the accident. The fact that the driver of the respondents was not joined in, as a defendant by the respondents should not be taken against them, as they, as innocent bystanders could not be compelled to proceed against anyone whom they did not wish to bring in. Whatever reasons they had were not for the court to enquire into. Once the court found the appellants as being responsible, however minimal, and with the court being unable to apportion the liability with anyone else, the appellants had to shoulder 100% responsibility (see pp 459B–C, 460G–461A).

[Bahasa Malaysia summary

Responden-responden merupakan penumpang-penumpang di dalam kereta yang dipandu oleh suami responden pertama (pemandu responden-responden). Pada masa itu, mereka sedang pergi ke kerja. Apabila dihadapi dengan asap yang tebal yang telah menghalang

A pandangannya, pemandu responden-responden telah mengendalikan kereta itu sedikit ke kanan tetapi telah kembali ke jalan yang asal kerana beliau telah melihat sebuah kenderaan yang datang. Tanpa mempunyai pilihan kecuali untuk memandu ke dalam asap itu, beliau telah memandu terus ke dalamnya dan telah dihadapkan dengan sebuah jentera penggelek jalan. Oleh kerana kenderaan itu dekat, B pemandu responden-responden tidak dapat mengelakkannya dan ini mengakibatkan kereta beliau melanggar bahagian belakang jentera penggelek jalan. Akibat perlanggaran itu, responden-responden telah mengalami kecederaan serius. Responden-responden telah memfailkan tindakan terhadap pemandu dan pemilik jentera C penggelek jalan, perayu-perayu kini, tetapi tidak terhadap pemandu responden-responden. Mahkamah sesyen telah memutuskan bahawa perayu-perayu adalah 100% bertanggungjawab, dan tuntutan am dan khusus telah diberi. Perayu-perayu merayu ke Mahkamah Tinggi.

Diputuskan, menolak rayuan tersebut:

D Responden-responden adalah penumpang-penumpang yang tidak bersalah. Oleh kerana mereka merupakan penonton, mereka tidak dapat menyumbang, sama ada secara positif atau negatif, kepada pengelakkan perlanggaran itu. Responden-responden adalah di dalam hak undang-undang mereka untuk menuntut terhadap mana-mana E atau semua orang yang bertangungjawab untuk kemalangan itu. Responden-responden tidak patut dipersalahkan atas fakta bahawa pemandu responden-responden tidak dibawa masuk sebagai defendan oleh responden-responden, oleh kerana mereka, sebagai orang yang berada di tempat kejadian yang tidak bersalah, tidak dapat dipaksa untuk menuntut terhadap sesiapa yang mereka tidak hendak F membawa masuk. Apa-apa alasan yang mereka ada tidak patut dipersoalkan oleh mahkamah. Setelah mahkamah mendapati perayu-perayu bersalah, bagaimana minimum sekalipun, dan oleh kerana mahkamah tidak dapat agih liabiliti kepada orang lain, perayu-perayu mesti memikul tanggungjawab 100% (lihat ms 459B–C, 460G–461A).

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Notes

For cases on road accidents, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue), paras 887–1108.

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Cases referred to

Chang Ming Feng & Anor v Jackson Lim @ Jackson ak Bajut [1999] 1 MLJ 1 (refd)

Damai Cheras Sdn Bhd & Anor v Poothapillai Krisnamoorthy [1998] 1 MLJ 639 (refd)

Dingle v Associated Newspapers Ltd and others [1961] 2 QB 162 (refd)

I *Marrapan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 (refd)

Md Jailani Ta'at (MM83292) v Zoolkiplie Hj Abdul Rahman & Anor [1990] 2 CLJ 256 (refd)

Oli Mohamed v Keith Murphy & Anor [1969] 2 MLJ 244 (refd)
Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] MLJ 87 (refd)
Tea Hock Chong v Razali Hanafiah [1990] 1 CLJ 833 (refd)
Wong Fook & satu lagi lwn Abdul Shukur Abdul Halim & satu lagi [1990] 2 CLJ 382 (refd)

Legislation referred to

Civil Law Act 1956 s 28A(2)(c)(ii)

Appeal from: Summons No 53–804 of 1996 (Sessions Court, Shah Alam)

Mani Raju (*Usha Nadarajah* with her) (*Wong Seng Chow, Nadarajah & Co*) for the defendant/appellant.
Justin Morais (*Justin Morais & Co*) for the respondent/plaintiff.

Suriyadi J: The brief facts of this runner case revealed that on 11 April 1996 both the plaintiffs ('the respondents') were passengers in a car bearing registration number KK 7407, driven by one Azlan Hisham bin Othman ('PW7'), the husband of the first respondent. They were then en route to work. When confronted by thick smoke, which blocked his view, PW7 had manoeuvred slightly to the right but returned to his original path as he saw an oncoming vehicle. Devoid of choice, except to drive through the said wall of smoke, he drove straight into it, to be confronted by the presence of a steamroller bearing registration number WBX 6897. Due to the proximity of the latter vehicle, PW7 was unable to avoid it, resulting in him crashing into the rear of that said steamroller. As a consequence of the collision, the respondents suffered severe injury.

The respondents subsequently filed a suit in the sessions court against the driver and owner of that steamroller, the current appellants, but none against PW7. A scrutiny of the pleadings clearly highlighted that the appellants had denied liability and had instead shifted total blame on PW7. During the hearing, the appellants had stoically ventilated that to succeed, the respondents had to prove whom or what had caused the accident, in particular the first appellants' culpability.

As far as the learned lower court judge was concerned, who the proximate cause of the accident was, was irrelevant, as PW7 had not been made a party to the case. So long as there was some negligence on the part of the first appellant, then the proximate cause or what the percentage liability of the appellants was, had become irrelevant. This invariably meant that no apportionment of liability could be made out. I saw no reason why I should detract from the legal views of the learned sessions court judge as he had correctly interpreted and stated the law.

Apart from the legal stance submitted by the appellants, not unexpectedly they down below had alleged that there was absolutely no evidence before the court which could have made them liable. Despite the strong argument, the lower court on 19 April 1999 had held the appellants 100% liable, and whereupon the general and specific claim had been

granted. In relation to this appeal, in brief the judge had ordered RM500 per month for ten years for the first respondent for nursing care, and a loss of income of RM2,682.23 per month after deducting RM250 for living expenses, based on an agreed multiplier of seven for the second respondent. The latter's gross amount came to RM225,307.23. Being dissatisfied, the appellants had filed this current appeal.

In the course of my deliberation, before dismissing the appeal with costs, I had concluded that the respondents were innocent passengers. Being so positioned as mere spectators, they would have been unable to contribute in any way, positively or negatively towards the avoidance of a collision. The respondents therefore were within their legal rights to proceed against any or all of the persons responsible for the accident. It is trite law that the respondents were at liberty to sue whomsoever they wish, to be held responsible for their losses and sufferings, be it the driver of their vehicle or any other third party (*Damai Cheras Sdn Bhd & Anor v Poothapillai Krisnamoorthy* [1998] 1 MLJ 639). In *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244) two separate vehicles, which had collided into each other, had ploughed into the premises of the plaintiff, causing some extensive damage. The court there had opined at p 245:

> It is clear law that if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the whole damage.

In *Dingle v Associated Newspapers Ltd and others* [1961] 2 QB 162, Devlin LJ had said at p 188:

> Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury.

By the common law, the plaintiff is entitled to recover the whole of the damages awarded in this case. Likewise in *Tan Bok Eng v Lim Meng Kok* [1988] 3 MLJ 63, Thean J had occasion to comment at pp 64–65:

> On a review of the evidence it seems to me that the first defendant was in part to blame for the accident. ... and, in my view, in this respect the first defendant was at least, and probably to a lesser extent than the second defendant, partly to blame for the accident. In this connection, it should be borne in mind that even if the extent of his blame for the accident was only 1%, the first defendant would still be a joint tortfeasor with the second defendant and vis-a-vis the plaintiff would be wholly liable.

Thereafter, it was up to the respective tortfeasors to seek any indemnity or contribution by joining others who were partly responsible as co-defendants or third parties (*Md Jailani Ta'at (MM83292) v Zoolkiplie Hj Abdul Rahman & Anor* [1990] 2 CLJ 256; *Tea Hock Chong v Razali Hanafiah* [1990] 1 CLJ

833; *Wong Fook & satu lagi lwn Abdul Shukur Abdul Halim & satu lagi* [1990] 2 CLJ 382). A

Returning to the mainstream, how could I not reject the appeal when the background facts revealed that PW7 (driver of the respondents), the two respondents (PW11 and 8) and SP6 (a neutral witness), had all testified that the appellants had failed to give sufficient warning of its presence when B driving the steamroller. The belching thick smoke that was emitted from the exhaust pipe of the steamroller, driven by the first appellant had invariably caused it to block PW7's view of its presence. The evidence adduced by them was consistent and not far fetched. The first appellant doing injustice to him, had admitted that, apart from him driving unescorted, no hazard/ beacon lights were in use either at the material time. He also admitted that C the steamroller was old, running on diesel oil, and any maintenance work done by him was on a trial and error basis.

It must be stated categorically that the learned session's judge here had first hand view of the evidence, and did have the added advantage of witnessing the demeanor of the witnesses. I must also state unhesitatingly D that I had failed to identify any fundamental mistake committed by the presiding judge, en route to his conclusions. On that score, it would have been improbable that I would have disturbed the finding of facts of the learned sessions court judge. On this matter, Lord Guest in *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 had occasion to remark at p 92: E

> There is a heavy onus on the party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 at p 587: F
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> 'I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion. G
>
> II. ...
>
> III. ...'

To wind up the matter on the issue of liability, based on the current facts, the fact that PW7 was not joined in as a defendant by the respondents should not be taken against them, as they, as innocent bystanders, could not H be compelled to proceed against anyone whom they did not wish to bring in. Whatever reasons they might have were not for the court to enquire into. With there being only the two interlinked appellants as the defendants, and with no application having been filed by them to add as an indemnifying or contributive party, in this case PW7 either as a third party or a co-defendant, the position of the appellants had become precarious. Once the I court found the appellants as being responsible, however minimal, and with the court being unable to apportion the liability with anyone else, as in this

A case, the appellants thus must shoulder 100% responsibility. The latter position will still stand true even though there may be others whose acts had contributed to the accident, but regretfully having been left out in the proceedings either deliberately or inadvertently. To clarify further, after obtaining judgment against the two appellants, the respondents may execute the order against any of the appellants, as each tortfeasor is liable B for the whole damage. Whether the appellants will be able to be indemnified by a third party or not later is of no concern to the respondents. On hindsight, the appellants should not be heard to complain as they, perhaps inadvertently, had placed themselves in that uncomfortable predicament when they had failed to rope in PW7 into the affray.

C

Issue of nursing care for the first respondent

Before me, on the issue of damages, the appellants had restricted their disaffections to the posers of nursing care costs of the first respondent, and the loss of income by the second respondent. In a nutshell, the appellants had asserted that the first respondent had no need of nursing care or D assistance — there being no evidence adduced to substantiate the claim. In the course of the hearing, the presiding sessions court judge who had held the vantage point of first hand sight of the physical afflictions of the respondent, aided by medical reports, had concluded that the first respondent certainly required financial as well as physical help from others E (*Marrapan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99).

A perusal of Dr Mohd Nor Manukaran's report at pp 360–367 of the record of appeal showed the first respondent's injuries as follows:

(1) fracture dislocation of left hip joint;

(2) intracranial haemorrhage and contusion of the vertex; and

F (3) sixth cranial nerve palsy right eye.

Despite the above contents of the specialist reports, the appellant had still insisted that as there was nothing endorsed in those reports requiring nursing care, compounded by her having returned to work, such nursing care costs should not be entertained. Despite this strong assertion, I could G not ignore SP3's medical report, which recorded that the first respondent would require walking aid for the rest of her natural life. On oath the latter had testified that she required assistance whenever she wanted to move around, don on her apparels, bathe, utilize the toilet facilities, cooking, etc. PW7's evidence, which had corroborated her assertions, had not been H diluted by the appellants either and as such had remained uncontradicted. In fact, the appellants had also unsuccessfully cross-examined the evidence of PW3 and PW11 regarding this matter.

To wind up this pertinent poser, having perused the stark clear evidence, which highlighted the afflictions, I was satisfied, as the presiding judge too was, that the first respondent indeed had suffered permanent I residual disabilities. Those disabilities had hindered her mobility and thus had become very much dependant on the assistance of others. That being so, the appellants had failed on this issue.

Loss of income of second respondent

The learned sessions court judge had meted down an award for loss of income based on the last drawn salary of the second respondent, that of April 1997 and not of April 1996 when the accident took place. The latter's last drawn salary as of April 1997 was RM2,932.23 whilst his salary at the time of accident was RM1,691.30. Apart from disagreeing with the latter decision, the learned counsel for the appellants had also questioned the sum of RM250 allocated by the presiding judge for his living expenses.

Section 28A(2)(c)(ii) of the Civil Law Act 1956 reads:

> (c) in awarding damages for loss of future earnings the court shall take into account —
> (i) ...
> (ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future.

The phrase 'any prospect of the earnings as aforesaid being increased at some time in the future', as promulgated in the above provision is central to the matter at hand. The above phrase must refer to a scenario where the likelihood of an increase in salary in the near future is uncertain and open to speculation, unlike the current case where the increase of his basic salary was certain. That being so, I was not prevented from taking into account an actual and calculable increment for purposes of calculating and awarding damages for loss of future earnings (*Chang Ming Feng & Anor v Jackson Lim @ Jackson ak Bajut* [1999] 1 MLJ 1). The deduction of RM250 as the second respondent's expenses was neither unreasonable nor an error of law or fact.

Based on the above reasons, I had dismissed the appeal with costs.

Appeal dismissed.

Reported by Peter Ling